In The

Supreme Court of the United States

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October Term, [redacted] 1970

No. [redacted]

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RICHARD G. AUGENBLICK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Richard G. Augenblick, petitioner, petitions for a writ of certiorari to review the order of the United States Court of Claims of April 4, 1969 which dismissed the cause before that court and denied petitioner leave to file his First Amended Petition in that court.

OPINIONS BELOW

The original opinion of the Court of Claims in this cause (dated May 12, 1967) is reported at 180 Ct. Cl. 131 and 377 F.2d 568. The opinion of this Court reversing the Court of Claims judgment is reported at 395 U.S. 348. The order of the Court of Claims of April 4, 1969 dismissing the petition and denying petitioner leave to file his First Amended Petition is set forth in the appendix to this petition.

JURISDICTION

The order of the Court of Claims was entered on April 4, 1969, and is set forth in the appendix to this petition. By order dated June 20, 1969, the time for filing a Petition for Certiorari was extended through September 1, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims erred in denying petitioner leave to file his First Amended Petition in the light of this Court's opinion in *U.S. v. Augenblick*, 395 U.S. 348 and this Court's other opinions.

2. Whether the Navy court-martial had jurisdiction to try the petitioner under this Court's holding in *O'Callahan v. Parker*, 395 U.S. 258.

3. Whether the Navy court-martial's conviction of the petitioner under Article 134 of the Uniform Code of Military Justice is unconstitutional under the fifth and sixth amendments to the Federal Constitution.

STATUTES INVOLVED

Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, provides as follows:

> "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Article 125 of the Uniform Code of Military Justice, 10 U.S.C. § 925, provides as follows:

> "(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> "(b) Any person found guilty of sodomy shall be punished as a court-martial may direct."

STATEMENT

I.

The Court of Claims Erred in Not Allowing Petitioner To Present Evidence of Prosecutional Impropriety

On October 22, 1964, petitioner (a former naval commander) filed his original petition in the Court of Claims. In it petitioner alleged that his was an unblemished and distinguished record for eighteen years in the U. S. Navy until the morning of January 12, 1961. On that date events occurred which resulted in his being tried for sodomy, a violation of Article 125 of the Uniform Code of Military Justice. Petitioner was acquitted of the sodomy

charge, but was convicted under Article 134 of the Uniform Code of Military Justice (the so-called "general article") of conduct "to the prejudice of good order and discipline" and "conduct of a nature to bring discredit upon the armed forces." Petitioner had never been charged under this article. He was convicted, however, on the theory that violations of Article 134 were "lesser included offenses" to those set out in Article 125.

Petitioner's original petition filed in 1964 in the Court of Claims alleged that (1) at petitioner's court-martial, one Hodges, an airman allegedly involved in the sexual act which gave rise to the charge testified; (2) at this same trial the defense requested (pursuant to the Jencks Act)[1] production of a tape recording of an interview between Hodges and Agent Mendelson of Naval Intelligence which occurred immediately after the alleged crime took place; (3) the defense requested Mendelson's written notes of the same interview; (4) the prosecution could not or would not produce the tape and the law officer denied all of petitioner's Jencks Act requests; (5) petitioner was acquitted of sodomy but convicted of conduct "to the prejudice of good order and discipline" and "conduct of a nature to bring discredit upon the armed forces", under Article 134, ostensibly a lesser included offense to that of sodomy under Article 125.

In its opinion of May 12, 1967,[2] declaring petitioner's conviction a nullity, the Court of Claims asserted that a combination of factors led it to conclude that, in this case, the Jencks Act violations were so weighty that they cumulated to the denial of a minimally fair trial. Important among these factors was the fact that Hodges had changed his story of the events to implicate petitioner

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[1] 18 U.S.C. § 3500.

[2] 180 Ct. Cl. 131; 377 F.2d 568.

during the Mendelson interview, and the fact that Hodges had been given favored treatment (an honorable discharge nine months after the events, within a week after testifying against the petitioner). It was the unanimous opinion of the Court of Claims that the Jencks rulings had interfered with petitioner's defense by blocking off all attempts to probe the existence of an improprer arrangement for testimony between the naval prosecution and Hodges. This, the Court of Claims determined, was a constitutional deprivation of due process under the special facts of this case. Thus the Court of Claims found jurisdiction to correct this constitutional abuse during the court-martial, to declare the conviction a nullity and to grant back pay.

On January 14, 1969, this Court reversed.[3] It held that the Jencks Act was not cast in constitutional terms. It stated further:

> "It may be that in some situations, denial of a Jencks Act type of a statement might be a denial of a Sixth Amendment right . . . But certain it is that this case is not a worthy candidate for consideration at the Constitutional level." (395 U.S. at 356).

But this Court did not wholly eliminate the spectre of constitutional abuse from the case. It stated (with reference to accomplice testimony):

> "Of course, if knowing use of its perjured character were linked with any testimony (*Mooney v. Holohan*, 294 U.S. 103; *Brady v. Maryland*, 373 U.S. 83), we would have a problem of different dimensions. But nothing of the kind is involved here." (Emphasis in the original) (395 U.S. at 353).

While this Court's mandate was pending before the Court of Claims (and before any action of dismissal had

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[3] 395 U.S. 348.

been taken), petitioner, on February 11, 1969, filed a Motion For Leave to File a First Amended Petition in the Court of Claims together with a proposed petition. In this motion and petition, petitioner asserted that:

(a) The Supreme Court had not ruled on the question of whether the Navy had knowingly bargained for and used the false testimony of Hodges in return for a promise of an honorable discharge;

(b) This question had been amply alluded to by petitioner in the prior Court of Claims proceedings—but solely within the framework of the Jencks issues, demonstrating the gravity of the Jencks violations present in the case;

(c) The Navy record in the case, while determined to be inadequate to sustain a *finding* that the Navy knowingly used perjured testimony, clearly justified the convening of a factual hearing before the Court of Claims, to determine whether the Navy had violated the petitioner's constitutional rights by consummating a bargain for false testimony from Hodges;

(d) This request for a Court of Claims hearing could not be deemed belated because any request for it (in that court's first consideration of the case) would have been denied as superfluous because the Court of Claims found constitutional defects within the Navy record without need for additional inquiry;

(e) Justice to this petitioner required the convening of such a hearing under the special facts of this case.

On April 4, 1969, petitioner's Motion For Leave To File this First Amended Petition was denied and his original petition was dismissed by the Court of Claims without opinion.

II

This Case Should Be Reconsidered and Reversed in the Light of *O'Callahan v. Parker*

While time for the filing of a petition for writ of certiorari from the Court of Claims order of April 4 was running, this Court filed its decision in *O'Callahan v. Parker* on June 2, 1969.[4] This Court's ruling set aside a court-martial conviction on two grounds. The first of these was that the military court had no jurisdiction to try O'Callahan since the crimes charged against him (specifically rape, housebreaking, assault and violation of the general article, Article 134) occurred under the following circumstances:

a. He was not on duty when the alleged crime took place (395 U.S. at 273);

b. There was no connection between the crimes alleged and the performance of his military duties; (*ibid.*)

c. The alleged crimes were not committed on a military post or enclave; (*ibid.*)

d. The person attacked by him was not performing any military duties; (*ibid.*)

e. The situs of the alleged crime was not an armed camp under military control; (*ibid.*)

f. Civil courts were available to try the alleged offense; (*ibid.*)

g. The alleged offenses were committed within the territorial limits of the United States; (*ibid.*)

h. The alleged offenses did not involve any question of the flouting of military authority, the security of a

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[4] 395 U.S. 258.

military post, or the integrity of military property. (395 U.S. at 274).

This Court determined, therefore, that O'Callahan's offenses were not "service connected" and that the military authorities lacked jurisdiction to try him for them. As pointed out below, each of these same circumstances is present in petitioner's case.

The following facts of record compel consideration of petitioner's conviction in the light of the *O'Callahan* decision:

(a) The petitioner was not on duty when the alleged offense took place, was not in unfirom at the time, nor was it known that he was in the Navy until *civilian* authorities had charged him with a civilian offense, viz., disorderly conduct;

(b) There was no connection in time or place, between the alleged offense and the performance of any military duties by the petitioner;

(c) The alleged offense took place outside of a military post or enclave; viz., on West Basin Drive in the District of Columbia;

(d) The individual involved in the alleged offense with the petitioner, although an airman, was off duty, at liberty, and did not know that the petitioner was a naval officer until after a charge had been placed by civilian arresting authorities;

(e) The situs of the alleged offense was the city of Washington, not an armed camp under military control;

(f) Civilian courts were fully available to try the matter;

(g) The alleged offense took place within the territorial limits of the United States;

(h) The alleged offense involved no question of the flouting of military authority (since it was not known by either the airman involved, nor by the civilian police that the petitioner was a naval officer until after the arrest has been made), did not involve the security of a military post, nor did it involve the integrity of military property.

The second basis for this Court's action in *O'Callahan* is of even more compelling relevance to the instant case. In *O'Callahan,* this Court also determined that the military authorities could not use Section 134 of the U.C.M.J. (the so-called "general article") as a means of establishing military jurisdiction over O'Callahan's offenses. As noted hereinabove, O'Callahan was specifically charged before trial with violation of this article. Petitioner, however, was never so charged, no evidence was taken to prove the elements of Article 134, and the law officer permitted each member of the seven-man court to interpret its vague terms without any definition whatsoever, but wholly subjectively.

III

The Procedural Posture of this Case Requires Summary Remand to the Court of Claims for Reconsideration in the light of *O'Callahan v. Parker.*

In presenting the foregoing reasons for granting the writ, petitioner has been faced with a baffling procedural dilemma. Petitioner's Motion For Leave To File the First Amended Petition was denied and his cause dismissed by the Court of Claims on April 4. On June 2, this Court decided *O'Callahan,* which materially changed the law concerning the jurisdiction of military tribunals and had specific, factual relevance to petitioner's case. Petitioner has taken the position since June 2

that orderly adjudication requires that the Court of Claims initially review this case in the light of *O'Callahan*. That court has a wealth of experience in dealing with military matters over the years, and the issues of "service connection" of petitioner's alleged crime, and of the constitutionality of Article 134, as applied to petitioner's court-martial conviction, should first be considered by that court.

But petitioner was faced with the problem of keeping both issues procedurally alive while orderly adjudication took place below. Time for the filing of a petition for certiorari from the April 4 order originally was to expire July 3. Following timely motion, this Court extended this period until September 1. This Court's Rule 22-1 specifically prohibits any further extension of time. Petitioner moved with expedition in moving for leave to file his second amended petition (outlining the *O'Callahan* grounds for relief) on July 14, 1969. However, since the Court of Claims is not in active session during the summer months, no action has been taken to date.

With no additional time available in which to petition from the April 4 order, and with no action from the Court of Claims on the second amended petition, petitioner was faced with a dilemma. He could either allow filing time on the April 4 order to lapse, or bifurcate his case by filing for certiorari on the April 4 order, without asserting the *O'Callahan* issue which was still pending in the Court of Claims. Following the latter course, however, would influence the Court of Claims to defer action on the second amended petition since a pending petition for certiorari would appear to oust the Court of jurisdiction. Such a result would be wholly disorderly because if petitioner was unsuccessful in obtaining certiorari of the April 4 order he would be required to petition this court again in the event of an adverse holding by the

Court of Claims with regard to the *O'Callahan* question. All issues should be considered on certiorari at one time. Order and sense so dictate.

As a result, the present petition asserts grounds for relief predicated on (1) error in the order of April 4, *and* (2) the applicability of *O'Callahan.* Petitioner's first prayer is therefore that this Court grant the writ, summarily vacate the April 4 order, and remand the case for consideration by the Court of Claims in the light of *O'Callahan.*

If the Court is not disposed to do so, considerations of orderly administration of justice compel petitioner to request that this Court enter an order deferring its action on this petition until the Court of Claims acts on the *O'Callahan* issue. Such an order would make it clear to the Court of Claims that this proceeding does not impair that court's duty to consider the O'Callahan issue; and would protect petitioner (whose assertion of both contentions in this Petition insures his timeliness). Finally, it would facilitate disposition of all issues by this Court in one proceeding.

If, however, this Court denies the accompanying motion requesting that it withhold action until the Court of Claims acts on the second amended petition, petitioner requests that this petition for certiorari should be considered *in toto* by this Court; and petitioner requests that this Court grant the writ to consider his case in the light of *O'Callahan,* and also to consider the question of error in denying the April 4 order. In that eventuality petitioner would seek leave to file a supplemental record with this Court covering the *O'Callahan* points. The original massive record of the Navy proceedings (covering, of course, the *O'Callahan* points) remains on file with the Court of Claims for its use in considering the second amended petition.

Reasons for Granting the Writ

This case first reached civilian courts as a prime example of the maladministration of military justice. It remains that. It is now, in addition, a case in which the Navy's jurisdiction to try the Defendant in the first instance is in question. It is now in addition a perfect example of the military misuse of the vague terms of "general" Article 134 (U.C.M.J.). Proper interpretation of this Court's own decisions, both the original *Augenblick* decision and the *O'Callahan* decision, requires review of this case's facts in terms of the questions raised by those decisions.

1. *The April 4 denial of a factual inquiry into impropriety by the prosecution in bargaining for Hodges testimoney invaded petitioner's constitutional rights.* There are two cogent reasons why this Court should reassess the factual record as it bears on due process in this case. The first is that it was this Court's own initial decision which pointed up and underscored the need for an additional inquiry into whether a tained arrangement for testimony was consciously perpetrated by the Navy. The Court stated that: " . . . if knowing use of its perjured character were linked with *any* testimony" (citing *Mooney v. Holohan*[5] and *Brady v. Maryland*[6] "we would have a problem of different dimensions. But nothing of the kind is involved here." (395 U.S. at 353). This Court was viewing the Navy record, and the Navy record alone. The Navy record was all that was before either the Court of Claims or this Court. *On that record, and on that record alone,* the Court could say (concerning any knowing use of perjury by the Navy) that "nothing of the kind is involved here." And, in so doing it determined that the

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[5] 294 U.S. 103.

[6] 373 U.S. 83.

Navy record alone could not justify a nullification of the court-martial conviction.

A far different question is whether that same record, replete with violations of petitioner's rights to vital discovery, justified inquiry to supplement the record to determine whether petitioner was a victim of prosecutional impropriety. The pleadings before the Court of Claims and this Court never requested any such additional inquiry. Such request would have been unnecessary and superfluous. The Court of Claims found constitutional abuse without it.

The fundamental and far-reaching question raised concerns the power of a serviceman to invoke the process of *any* civilian court to order further inquiry where the aura of prosecutorial impropriety is unmistakeable but its proof incomplete. The power of the civilian courts to correct constitutional abuse in military proceedings is fatally flawed if these courts must accept the military record with finality and cannot order inquiry into violations of due process.

The error of the April 4 denial of further inquiry can be seen most clearly if the Court will view this petitioner alongside an *imprisoned* military defendant whose trial record was precisely the same as petitioner's – with only the sentence differing. Under these circumstances, the tests pronounced by this Court in *Townsend v. Sain*, 372 U.S. 293, would, on this selfsame record, manifestly require a habeas corpus inquiry into prosecutorial impropriety. Servicemen whose lives and careers have been blighted by cashiering deserve the same procedural protection of their constitutional rights.

2. *The April 4 dismissal of this cause was in error since the military court was without jurisdiction to try the petitioner.*

As noted in the Statement, the facts of record concerning petitioner's alleged crimes are on all fours with those

in *O'Callahan*. This would indicate on its face that the military court had no jurisdiction to try the petitioner, that his conviction was a nullity, and that it was error for the Court of Claims to dismiss the cause on April 4. As articulated by this Court in *O'Callahan*, this want of jurisdiction carries with it constitutional deprivations suffered by the servicemen improperly tried. He is (1) denied the right to a grand jury proceeding before the charge against him proceeds to trial, and (2) of greatest importance, he is denied a trial by a civilian jury. These rights are guaranteed by the Federal Constitution.

The unconstitutional denial of a civilian jury trial was particularly prejudicial in this case since the nature of the accusation (sodomy) is so inflammatory within the Navy that a fair determination of guilt or innocence of this charge (or any so-called lesser included charge) is virtually impossible at the hands of a Navy court-martial. Petitioner submits that naval authorities should be permitted to try such charges only when they involve conduct aboard ship or within a Navy installation, if the charged serviceman is to have a chance at all. In all other cases, the determination of guilt by a *civilian* jury (if guilt is determined) would permit appropriate administrative disposition by the Navy of the guilty serviceman to protect the Navy's legitimate concerns.

3. *The April 4 dismissal of the cause was constitutionally defective since Petitioner's conviction at court-martial for violation of Article 134 was itself an unconstitutional abridgement of petitioner's rights, for which he was entitled to relief as a matter of law.*

The Supreme Court, in *O'Callahan*, questioned whether Article 134 complied with constitutional requirements of specificity (395 U.S. at 266), raising the same serious constitutional questions that are raised concerning petitioner's conviction under Article 134 in the present case. Petitioner

alleges that the Navy's conviction of him under Article 134 (as a so-called "lesser included offense" within Article 125) deprived petitioner of constitutional due process because the elements of criminal conduct embraced by Article 134 differ substantially from those set out in Article 125.

(1) Specifically, petitioner was convicted of conduct "to the prejudice of good order and discipline in the Armed Forces" and "conduct of a nature to bring discredit upon the Armed Forces." He was never charged with this conduct. He successfully defended the only charge brought against him. After this successful defense, he found himself convicted of an offense which was never defined by the Navy court and which manifestly involved considerations far more complex than the simple, physical elements required for proof of sodomy (a common-law crime with elements precisely defined by our criminal law). Petitioner was thus convicted of an offense for which he was never charged[7] and was therefore denied the right to be "informed of the nature and cause of the accusation" as guaranteed by the sixth amendment to the Federal Constitution.

(2) This conviction under Article 134 was permitted by the Navy court, although all of the evidence against the petitioner concerned the physical facts involved in the alleged offense. *No* evidence was adduced by the Navy to establish that this physical conduct was "to the prejudice of good order and discipline in the Armed Forces" and "conduct of a nature to bring discredit to the Armed Forces." The Navy court, in effect, directed a verdict against the petitioner (with no evidence in support thereof) on these crucial elements of Article

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[7] In contrast, O'Callahan *was* specifically charged at the outset of the proceeding against him with a violation of Article 134.

134, in violation of petitioner's right to a jury trial of all issues in this criminal cause, as guaranteed by the Federal Constitution.

(3) This conviction under Article 134 followed an instruction given the Navy court (by the law officer) limited to a simple reading of the article itself. This instruction authorized a conviction by the Navy court on whatever individual subjective interpretations the seven members of the court might make of the vague language of this general article. Petitioner was thus under jeopardy of seven sets of instincts, prejudices, and preconcieved notions of what constituted conduct prejudicial to naval order and discipline, and under jeopardy of the same disparate views as to what conduct was of a nature to bring discredit to the Navy.

In each of these respects the Petitioner's constitutional rights were violated.

CONCLUSION

Petitioner therefore prays that the Court grant a writ of certiorari and summarily vacate the April 4 order of the Court of Claims and remand this case for consideration in the light of *O'Callahan v. Parker.*

If the Court is not disposed to grant the foregoing prayer, petitioner prays that this Court enter an order stating that it will withhold action on this petition until the Court of Claims has acted on petitioner's second amended petition, now under consideration by the Court of Claims.

If the Court is not disposed to grant this motion, petitioner prays that a writ of certiorari to the Court of Claims be granted providing for review by this Court of the Court of Claims order of April 4, including the dismissal by the Court of Claims of this cause in light of this Court's decision in *O'Callahan v. Parker.*

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Petition have been furnished Charles M. Munnecke, Esquire, Attorney, Civil Division, Department of Justice, Room 3636, Federal Triangle Building, Washington, D.C., and to Erwin Griswald, Solicitor General, Department of Justice, Washington, D.C., by hand delivery, this 2nd day of September, 1969.

_____

Attorney

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 357-64

RICHARD G. AUGENBLICK

v.

THE UNITED STATES

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

This case comes before the court on remand from the Supreme Court, filed February 11, 1969, wherein that court ordered reversal of the judgment entered in this court on May 12, 1967, with further proceedings here to be held in conformity with that court's opinion of January 14, 1969, in *United States v. Augenblick*, No. 45, October Term, 1968. The case is also before the court for consideration of plaintiff's motion, filed February 12, 1969, for leave to file first amended petition, which together with the opposition thereto, is considered without oral argument. Upon consideration thereof,

IT IS ORDERED that plaintiff's said motion for leave to file first amended petition be and the same is denied.

IT IS FURTHER ORDERED that the judgment entered herein on May 12, 1967, be and the same is vacated and withdrawn, and that plaintiff's petition be and the same is dismissed.

BY THE COURT

Apr - 4 1969

/s/
Chief Judge

APPENDIX